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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

KANSAI IRON WORKS, LTD.,
Petitioner,

v.

MARUBENI-IIDA, INC., WEST COAST MACHINERY COMPANY, JERRY DEUTSCH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The petitioner, Kansai Iron Works, Ltd., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on June 8, 1972.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported at 80 Wn.2d 707 and appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on June 8, 1972. This Petition for Certiorari is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. What are the requirements for the assertion of personal jurisdiction across national borders against a party located in a foreign country?

2. Whether Washington courts can assert personal jurisdiction in a third party indemnity action brought by the American subsidiary of a Japanese trading company against a Japanese manufacturing company.

3. Whether generally recognized principals of international law have been violated by the Court below, thus impairing foreign relations and foreign commerce, and intruding into areas within the exclusive jurisdiction of the federal government.

4. Whether the Due Process Clause and the Commerce Clause of the United States Constitution require consideration of different and additional factors before personal jurisdiction can be asserted over a party located in a foreign country.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal Constitutional provisions involved are Article I, Section 8 of the United States Constitution and the Fourteenth Amendment thereto. The primary statutory provision is Revised Code of Washington 4.28.185:

> "(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

STATEMENT OF THE CASE

On June 28, 1968, the plaintiff, Jerry Deutsch injured his hand at work while operating a large mechanical metal press. The press was sold to the Boeing Company by West Coast Machinery Company, a Washington corporation. West Coast purchased the press from Marubeni-Iida, Inc., a New York corporation, who in turn purchased the press

from their parent company, Marubeni-Iida Co., Ltd., one of the giant Japanese trading companies (hereinafter Marubeni Japan). The Japanese corporations purchased the press from Kansai Iron Works Company, Ltd., a Japanese corporation. Kansai was the manufacturer of the press and the petitioner herein.

Kansai Iron Works, Ltd. is an Osaka, Japan, company engaged in the manufacture of heavy machinery. Kansai is purely a domestic Japanese corporation and has no subsidiaries, sales representatives, service facilities, or any other personnel in the State of Washington or, indeed, anywhere in the United States.

The purchase order from Marubeni Japan and order of confirmation are principally in the Japanese language. The press, built to the specifications of the Boeing Company, was to be delivered to Marubeni in Kobe, Japan. Participation in this transaction was solicited by Marubeni Japan in Japan and was not initiated by Kansai. Kansai, however, did have some subsequent contact with the press once delivered in the United States.

The plaintiff Deutsch subsequently sued West Coast Machinery and Marubeni. Marubeni brought a third party action against Kansai and apparently served Kansai in Japan. Kansai brought suit against Marubeni in Japan for the purpose of determining the question of indemnity in Japan under Japanese laws.

Kansai brought a motion to dismiss the complaint for lack of jurisdiction in the Washington suit. In the motion and the Memorandum of Authorities in support thereof, Kansai raised the argument that such assertion of jurisdiction was in violation of the due process clause of the

Fourteenth Amendment and in violation of the foreign commerce clause of Article I, Section 8. These arguments were renewed in the Petition for Certiorari in the Washington State Supreme Court and in the briefs in support thereof.

REASONS FOR GRANTING WRIT

1. Importance of Case

This case squarely presents the question of personal jurisdiction over parties in a foreign country. It is a question which has not yet been resolved by the United States Supreme Court. In view of the large amounts of trade with foreign countries and the advent of strict liability in the field of product liability for tort law, the question of the reach of "long-arm" statutes across national borders is one which should be resolved by this Court. In view of the possibility of retaliation for over-reaching jurisdiction by courts in the United States, the question of the limit of such jurisdiction is a question of great national interest.

Literally billions of dollars in foreign trade come from Japanese companies through the auspices of the extremely large Japanese trading companies. These companies justifiably expect when they make contracts and enter into relationships in Japan that these relationships will be governed by Japanese law and Japanese commercial practice. When, as here, the American plaintiff has not even attempted to serve the Japanese manufacturer, there can be no compelling interest which can justify an attempt to restructure internal Japanese business relationships. Although Marubeni Iida, Inc., the respondent herein, is a New York Corporation, such a corporate identity cannot obscure the fact that in reality this is a dispute between two Japanese companies and should be resolved in Japan.

2. Due Process Clause Requires Different Approach for International Jurisdiction

The opinion of the Supreme Court of Washington in large part approached the case as if it were a conventional "long arm" jurisdiction case. There was not sufficient analysis of the important international aspects of the case. The Court should have approached a case with such implications for international relations in an entirely different manner from a case involving only interstate transactions. Even cases which have upheld jurisdiction over a corporation or individual in a foreign country have recognized that to assert jurisdiction in a foreign country requires substantially more than the assertion of jurisdiction over a person or individual in a sister state. (*see, e.g., Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969) ("What is needed is some additional factor . . ."). Even the Washington State Court of Appeals in *Omstead v. Brader Heaters, Inc.*, 5 Wn.App. 258 (1971), recognized that they have to "give consideration to other factors" when an international context was presented. See also Ehrenzweig, *Interstate and International Conflicts Law: A Place for Segregation*, 41 Minn.L.Rev. 717 (1957); Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 Cal.L.Rev. 1599 (1966).

The reason for this different analysis was well stated by Mr. Justice Jackson in *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953), as follows:

> "If, to serve some immediate interest, the courts of each [state] were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."

Although dealing with Jones Act liability, the analysis of the Court in that case forthrightly states the policy reasons for a great hesitance in asserting jurisdiction beyond national borders as follows:

> "[International law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each national will claim as its own . . . In dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

See also R. Falk, *Essays on International Jurisdiction* 11 (1961). Von Mehren and Trautman, *Jurisdiction to Adjudicate, a Suggested Analysis*, 79 Harv.L.Rev. 1121, 1127 (1966), reaches the same conclusion but with a slightly different analysis of the policy reasons for such a conclusion:

> "In establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate and convenient. To a degree it must take into account the views of other communities concerned. Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal and economic reprisals."

3. Conflicts Between Circuits

Although conflict between the circuits of the Court of Appeals is not normally a basis for reviewing decisions of a state court, the instant case does provide a means of resolving a conflict between the circuits which has not yet

been resolved by the United States Supreme Court. The Sixth Circuit in *Velandra v. Regis Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964), held that sales of Renault automobiles with a dollar volume in excess of $100,000.00 were not sufficient contact with the forum to justify the assertion of personal jurisdiction, noting:

> "In determining whether minimum contacts exist on the basis of the presence or sale of a product within a state, the extent of the contact is related to a number of factors, including the number and value of sales within the state, their ratio to the total market for like or similar products within the state, the quantity or value of the defendant's production, the percentage of the total output sold within the state, as well as the nature of the product, particularly with reference to whether it is inherently dangerous or not. Obviously the manufacturer of a product that has a significant market within a state has more contact with that state than one whose product only has a minimal market. Likewise, a manufacturer whose total product or a large percentage of whose product is sold within a state has a more significant contact with that state than would be the case where only a small portion of the manufacturer's production was sold within the state. Finally, the nature of the product may well have a bearing upon the issue of minimum contact, with a lesser volume of inherently dangerous products constituting a more significant contact with the state than would a larger volume of products offering little or no hazard to the inhabitants of the state. A careful and discriminating analysis of the nature and quality of the defendants' contacts with the foreign state must be made in each case."

The Ninth Circuit has taken a different view in *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969). This case involved the sale of coach bodies in England to a manufacturer located there. The sale contemplated the eventual use of the coaches in Hawaii. The

Ninth Circuit upheld the assertion of long arm jurisdiction under the Hawaii "long-arm" statute, adopting a much looser analysis of the requirements for international jurisdiction. The *Duple* case has been the subject of considerable law review criticism. See Note, 12 B.C. Ind. & Com.L. Rev. 130, 137 (1970):

> "[T]he due process standard applied in *Duple* should not be solely determinative of jurisdictional questions in an international situation."

See also Note, 24 Sw.L.J. 532, 537 (1970):

> "The difficulty in consideraing *Duple* is that the Court is apparently attempting to establish its own due process standard for personal jurisdiction in an international trade situation."

The effect of this conflict is not merely of academic interest. Billions of dollars worth of trade flow in and out of our country yearly, both through intermediaries and through direct dealings in the United States. The question of the reach of courts in the United States to resolve essentially foreign disputes is a matter with enormous consequences. It is a question where the uncertainty should be eliminated and the matter resolved at the highest judicial level.

4. Federal Supremacy Over Foreign Commerce

At an early date, the Supreme Court decided that the clause regulating commerce with foreign nations was almost exclusively within the purview of the National government. See *Bowman v. C & N.W. Ry.*, 125 U.S. 465 at 482 (1888):

> "Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively

from the legislative authority of the nation. The organization of our state and federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce except through the government of the United States and its laws and treaties."

The United States Supreme Court still adheres to the absolute supremacy of the federal government with regard to foreign commerce and foreign regulations. See *Hofstetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964); *Cf. Franco v. Standard Marine Ins. Co. Ltd.*, 185 N.Y.S.2d 581 (N.Y. City Ct., 1959). There is thus a constitutional obligation to dismiss a suit burdening foreign commerce. An indemnity action by a nonresident against a corporation located in a foreign country is such a burden on foreign commerce. *Overstreet v. Canadian Pacific Airlines*, 152 F.Supp. 838 (S.D. N.Y., 1957); See A. Ehrenzweig, *A Treatise on the Conflict of Laws* 147 (1962).

5. Finality

Although the question of liability in the primary case remains to be litigated, the question of jurisdiction in the third party suit has been finally determined by the highest court of the State of Washington. As such, the petitioner faces further proceedings in the State court. Such proceedings are beyond the power of the state court.

Such a lack of jurisdiction has been held to constitute a final determination and render the case subject to review by this court. See *Local No. 438 Construction and General Laborers Union v. Curry*, 371 U.S. 942, 9 L.Ed.2d 514, 83 S.Ct. 531, concerning a temporary injunction against labor picketing in Georgia. This Court held that jurisdiction over labor disputes was exclusively in the federal govern-

ment and allowed the writ of certiorari even though the Georgia case was not final. In part this Court said:

> "Unless this judgment is reviewable now, petitioner will inevitably remain subject to the issuance of a temporary injunction at the request of the respondents and must face further proceedings in the state courts which the state courts have no power to conduct." 371 U.S. at 550.

Another important case in this area is *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520. This case concerned venue over cases involving national banks. While the case was in its early stages, this Court held that it had appellate jurisdiction, reasoning the questions of jurisdiction and venue were separate and independent, "anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 371 U.S. at 558.

A third case, *Rosenblatt v. American Cyanamid Company*, 86 S.Ct. 1, 15 L.Ed.2d 39 (opinion by Justice Goldberg as Circuit Justice) is squarely on point. That case, as this, involved assertions of state long-arm jurisdiction over a foreign national. Justice Goldberg held that there was a final judgment for the purposes of seeking an appeal. He stated as follows:

> "Here, as in Curry, there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts; (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of in personam jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case." 86 S.Ct. at 3, 15 L.Ed.2d at 42.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JERRY DEUTSCH,
Plaintiff,
v.
WEST COAST MACHINERY COMPANY,
Defendant,
MARUBENI-IIDA, INC., a corporation,
Respondent,
KANSAI IRON WORKS, LTD., a Japanese corporation,
Petitioner.

No. 42163
EN BANC

Filed
June 8, 1972

This is a review of an order denying the motion of the third party defendant (petitioner), Kansai Iron Works, Ltd. (a Japanese corporation hereafter referred to as Kansai), to dismiss for lack of jurisdiction a cross complaint by the third party plaintiff (respondent), Marubeni-Iida, Inc. (a New York corporation hereafter referred to as Marubeni America).

The suit giving rise to the cross-claim and to this action was initiated by the plaintiff, Jerry Deutsch, against the defendants, West Coast Machinery Company (a Washington corporation hereafter referred to as West Coast), Marubeni America and Kansai. Services of process was made upon West Coast and Marubeni America, but not upon Kansai. The plaintiff is now barred by the statute of limitations from asserting any claim against Kansai.

The plaintiff, an employee of the Boeing Company on June 28, 1968, seriously injured his hand at work while op-

erating a large mechanical metal press. The press was sold to the Boeing Compnay by West Coast. West Coast purchased the press from Marubeni America, which in turn purchased the press from Marubeni-Iida Co., Ltd. (a Japanese corporation hereafter referred to as Marubeni Japan). Marubeni Japan purchased the press from Kansai, the manufacturer and petitioner herein.

Kansai is an Osaka, Japan company engaged in the manufacture of heavy machinery. In May of 1966, upon receipt of a purchase order from Marubeni Japan, Kansai manufactured a 110 ton openback non-inclinable power press. The record indicates that the press was manufactured according to extensive specifications furnished by the Boeing Company. The press was delivered to Marubeni Japan, a large Japanese trading company, which in turn shipped it to its subsidiary, Marubeni America, at its Los Angeles headquarters. The press was then sent to West Coast who delivered it to the Boeing Company. In January of 1967, Kansai sent its engineers to the Boeing Company in Washington to test the operation of the press. Subsequently, a selector switch failed. At the request of Marubeni Japan, Kansai sent a replacement switch to West Coast for installation on the press. In June of 1967, Kansai sent its engineers to the Boeing Company with parts for the machine. Pursuant to Boeing Company policies, however, Boeing personnel made the actual repairs in replacement of the parts. In July of 1967, Kansai sent an engineer, Mr. Obatake, to the United States with respect to machinery in other states and to that located at the Boeing Company. Mr. Obatake, however, was not allowed to make any adjustments or repairs to the press.

The plaintiff Deutsch claims that the press was defective and malfunctioned, severing most of his left hand, for which he is asking $275,000. On April 10, 1970, Marubeni America filed a cross-claim for indemnification against Kansai. On December 3, 1970, Kansai filed a notice of appearance to contest jurisdiction. On July 30, 1971, Kansai moved for an order dismissing the complaint against it on the grounds that the Washington court lacked jurisdiction over it. The motion was denied September 23, 1971, and this court granted a writ of certiorari on October 15, 1971, which has brought the matter here for review.

The petitioner, Kansai, claims that service of process was not made on it by Marubeni America; however, we find this contention to be without merit as service was admitted by Japanese counsel for Kansai in the documents which are on file and constitute a part of the record in this case. Furthermore, the record contains substantial additional evidence supporting the conclusion that service was effected upon Kansai through the Osaka District Court in Japan.

Kansai's primary contention is that it has no sales representatives, service facilities, or other personnel in the state of Washington or anywhere in the United States and that it does not directly advertise or solicit orders or transact any business in the state of Washington which would submit it to the Washington jurisdiction.

The third party plaintiff, Marubeni America, claims that the Washington court has jurisdiction over Kansai under the provisions of RCW 4.28.185, our long-arm statute, which provides, in part, as follows:

(1) Any person, whether or not a citizen or resident

of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commisison of a tortious act within this state;

. . .

The basic issue here is whether the courts of this state, under the long-arm statute, have jurisdiction over Kansai Iron Works, Ltd., a Japanese corporation, as a third party defendant under a cross-claim for indemnification, when a product of that corporation is sold through intermediaries to a Washington corporation, with the knowledge that the product is being sold ultimately to a Washington corporation, and that product causes injury in the state of Washington by reason of an asserted defective manufacture of the product, while being used for the purposes for which it was intended.

It is well established in this state that under the long-arm statute, RCW 4.28.185, our courts may assert jurisdiction over nonresident individuals and foreign corporations to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute. *See Oliver v. American Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967), and *Tyee Constr. Co. v. Dulien Steel Prods. Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963), and cases cited therein. In order to subject nonresident defendants and foreign corporations to the in personam jurisdiction of this state as the forum under RCW

4.28.185(1) (a) and (b), the following factors must coincide: (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. *Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wn.2d 823, 435 P.2d 626 (1967); *Quigley v. Spano Crane Sales & Serv. Inc.*, 70 Wn.2d 198, 422 P.2d 512 (1967); *Tyee Constr. Co. v. Dulien Steel Prods. Inc., supra.*

In the instant case, the record shows numerous uncontroverted contacts between Kansai and the state of Washington. Kansai manufactured, packaged and shipped the press according to Boeing Company specifications, as evidenced by Boeing Spec. No. EEUM 6204P containing the following relevant provisions:

1.0 Scope

1.1 This specification is intended to cover the procurement of a Kansai Iron Works, 110 Ton Openback Non-Inclinable Press, with features and modifications to meet or exceed the requirements specified.

...

3.0 Requirements

Manufacturer's contractual obligations for the design and function of an existing, standard model press.

4.0 Inspection and Acceptance

...

4.6 Final acceptance shall be contingent upon the equipment meeting the specifications and above requirements after installation at the Buyer's plant.

...

6.0 Shipping

6.1 The press, when shipped, shall include all necessary electrical motors, pumps, piping and controls, wiring and piping between press, pumps, motors and control units to be operative when set up.

6.2 All rust preventive coatings, packing, crating, etc., must conform to good export practices in order to insure minimum exposure of equipment during shipment.

6.3 The number of shipping units and/or crates shall appear on each unit and/or crate and contents of each shall be furnished to the customer.

7.0 Manufacturer's Responsibility

7.1 The machine tool manufacturer shall be responsible for the design, manufacture, performance, reliability and packaging of the control system and the controlled equipment as defined in this specification. This responsibility shall provide for technical direction during installation and maintenance assistance during the warranty period.

7.2 Warranty:

The vendor shall warrant that all equipment delivered to this specification shall be free from defects in materials and workmanship, that all items will conform to applicable specifications and drawings and to the extent that such items are not manufactured pursuant to detailed design furnished by buyer, that all items will be free from defects in design and suitable for the intended purpose. Warranties shall extend for one year from date of first full and satisfactory operation

at the buyer's plant assuming equipment to be installed within 60 days of shipping date.

And as evidenced by West Coast's purchase order containing *inter alia*, the following requirement:

4. Packing and shipping must be in accordance with Boeing form ADX 4797.

In June 1966, at the request of Kansai, Boeing personnel were present for a test operation of the press at its plant in Japan. And, as heretofore stated, in January 1967, Kansai sent its engineers to the Boeing Company in Washington to test the operation of the press; Kansai sent a replacement selector switch to Washington for installation on the press; in June 1967, Kansai sent its engineers to the Boeing Company with parts and to check the operation of the press; and, in July 1967, Kansai's engineer, Mr. Obatake, visited the Boeing Company with respect to the press.

From these facts, we are convinced that the first two essential factors for the Washington court to take jurisdiction under the long-arm statute have been fulfilled in that the activities of the petitioner, Kansai, incidental to its manufacture, testing, sale and subsequent inspections of the press at the Boeing Company, and the replacement of the selector switch and of other parts thereon, constituted the transaction of business within the state; that Kansai purposefully manufactured the press knowing that the Boeing Company was the ultimate buyer; and that the press was used as intended, which resulted in injury to the plaintiff in the state of Washington, due to the claimed defective manufacture.

It is argued, however, that this court cannot take jurisdiction of Kansai as to do so would offend the traditional notions of fair play and substantial justice, therein failing to

fulfill the third factor essential for the Washington court's jurisdiction. In making this determination, we must consider the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

In consideration of this contention, it must first be remembered that this was not an isolated transaction of Kansai in the United States. The record shows that the business of Kansai was extensive in this country in that it sent its engineers to the United States in response to matters concerning machinery in other states and in Washington, and that it would therefore be relatively more convenient for Kansai to appear in the Washington courts than for the third party plaintiff and necessary witnesses to appear in the courts of Japan. Further, Kansai has had the benefit of the protection of the laws in this country and this state in the prosecution of its business.

Moreover, by reason of the asserted commission of a tort by Kansai in the state of Washington, resulting from the manufacture of the defective press, the instant case falls within the reasoning of those cases which hold that a manufacturer, under these circumstances, cannot reasonably claim it is surprised at being held to answer for the damage its product causes in the jurisdiction where it purposely intended the product to be used. *See Quigley v. Crane Sales & Serv. Inc.*, 70 Wn.2d 198, 422 P.2d 512 (1967); *Golden Gate Hop Ranch Inc., v. Velsicol Chem. Corp.*, 66 Wn. 2d 469, 403 P.2d 351 (1965), *cert. denied*, 382 U.S. 1025; *Nixon v. Cohn*, 62 Wn.2d 987, 385 P.2d 305 (1963). *See also Benn v. Linden Crane Co.*, 326 F. Supp. 995 (E.D. Pa.

(1971); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969). We are satisfied that the traditional notions of fair play and substantial justice are not offended by the Washington court in taking jurisdiction of Kansai in this case.

Kansai argues, however, that a different rule must be applied when this involves the manufacturer in a foreign country. This argument was specifically answered in the recent case of *Duple Motor Bodies, Ltd. v. Hollingsworth*, *supra*, involving a foreign manufacturer located in England. The Ninth Circuit Court, interpreting the Hawaii long-arm statute which is similar to our Washington statue, stated at page 235:

> In our judgment, the presence of Duple's coach bodies in Hawaii, brought about by Duple's sale to Vauxhall with knowledge that the product was destined for Hawaii, was sufficient contact with Hawaii to meet the requirements of due process.
>
> We do not regard it as offensive to fair play or substantial justice or an undue burden on foreign trade to require a manufacturer to defend his product wherever he himself has placed it, either directly or through the normal distributive channels of trade. If it is clearly foreseeable as a result of trade with a foreign state that injury from a defective product (if it occurs) would occur in that state, the hardship of defending the product in that state in our judgment must be assumed as an attribute of foreign trade.

In the case of *Benn v. Linden Crane Co.*, *supra*, the foreign manufacturer was in the country of Sweden. In that case a crane was sold to a purchaser in Connecticut, but the manufacturer did not know, as the manufacturer did in the instant case, where it was ultimately to be used in the United States. The court held, however, that the knowledge it was to be ultimately used in the United States was suffi-

cient to constitute the foreign manufacturer doing business within the state of Pennsylvania, under the Pennsylvania long-arm statute, where the crane was ultimately used, and that the extension of jurisdiction by the Pennsylvania court over the Swedish corporation did not offend "notions of fair play and equal justice." The court stated:

> Linden-Alimak had reason to know that the crane would be resold for ultimate use and operation in the United States. The crane, while being operated in Pennsylvania, allegedly injured plaintiff by reason of a malfunction claimed to be caused by the negligence of the manufacturer and others. Under these facts, I find that Linden-Alimak made an "indirect shipment of goods" into Pennsylvania and was "doing business" with the definition of the Pennsylvania statute. Linden-Alimak is thereby rendered subject to the jursidiction of this Court.
>
> . . .
>
> "*. . .When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes.*"
>
> . . .
>
> . . . I find that there were sufficient contacts between defendant and Pennsylvania at the time this action was instituted to come within the broad constitutional limits of due process as set forth in International Shoe Company v. State of Washington, *supra*, and later cases. Under the facts of this case, it is unnecessary to decide just how far the term "shipping of merchandise directly or indirectly into or through" Pennsylvania may extend within the constitutional limits of "due process." *As applied to the facts herein disclosed and the statute as herein interpreted, the extension of jurisdiction over the Swedish corporation, Linden-Alimak, I find does not*

> *violate "due process" nor offend the "notions of fair play and equal justice."*

(Italics ours.) *Benn v. Linden Crane Co.*, 326 F. Supp. 995, 997 (E.D. Pa. 1971).

We agree with the reasoning of the courts in *Duple* and *Benn*, and are satisfied that the traditional notions of fair play and substantial justice have not been violated as applied to Kansai, the third party defendant, in this case.

Kansai further argues, however, that the trial court, in denying its motion for dismissal, has violated the commerce clause of the United States Constitution, article 1, section 8:

> The congress shall have power. . .
> To regulate commerce *with foreign nations*, and *among the several states*. . . .
> . . .
> . . .; and
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . .

(Italics ours.)

Essentially the question raised by this argument is whether the state courts, in assuming jurisdiction of a foreign manufacturer, create a burden upon foreign commerce. The crucial test is the same as in the case of interstate commerce, whether taking jurisdiction of a nonresident manufacturer in this country by the Washington court is offensive to the traditional notions of fair play and substantial justice, and thereby constituting an undue burden on interstate commerce.

We are aware, however, in applying this test to foreign commerce, that great caution should be exercised in that

factors are involved by reason of natural barriers affecting cost of travel and communication, which are less likely to exist in the case of nonresident manufacturers in the United States. These factors, however, have been considered in our determination of the issue of the traditional notions of fair play and substantial justice as applied to the parties in this case, and we are satisfied that no undue burden upon foreign commerce will result from this determination.

The petitioner argues that the long-arm statute does not apply to this indemnity action and that for purposes of the third party action, Kansai neither transacted any business nor committed a "tortious act" in Washington. We disagree.

The rights of the third party plaintiff for indemnification against the third party defendant in this action are dependent upon the primary liability of the third party defendant by reason of its asserted negligence in the manufacture of the press. It would not only be most unfair to require the third party plaintiff to relitigate this case in another independent action, but it would be contrary to the doctrine that would avoid a multiplicity of suits. This doctrine is expressly contemplated by our court rule, CR 14(a), which provides in part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

It is clear that the rule affords a means of bringing in a third party who may be liable to the defendant by way of indemnity, subrogation, contribution and warranty, as well as in other situations. This rule is consistent with the case

law in this state in regard to the right of a third party to indemnity from a wrongdoer who is guilty of primary negligence. In *Rufener v. Scott*, 46 Wn.2d 240, 242, 280 P.2d 253 (1955), we held:

> It is the general rule that there is no right of indemnity between joint tort-feasors. *Duncan v. Judge*, 43 Wn.2d 836, 264 P.2d 865. However, if the tortfeasors are not *in pari delicto* and the negligence of one is primary or active and the negligence of the other is passive, resulting in injury to a third person, and the one guilty of passive negligence is required to answer in damages to the third person, he is entitled to indemnity from the wrongdoer guilty of primary negligence.

In the instant case the injury to the plaintiff is claimed to be a result of the primary negligence of the manufacturer, the third party defendant. The third party plaintiff under our law, therefore, is entitled to indemnification from the manufacturer, and to the benefit of the long-arm statute. This rule is also followed in other jurisdictions.

In the case of *Kroger Co. v Adkins Transfer Co.*, 284 F. Supp. 371 (M.D. Tenn. 1968), which involved the determination of whether an action for the indemnification against a nonresident manufacturer comes within the Tennessee longarm statute which, similar to our statute, predicates jurisdiction of the court over an out-of-state manufacturer for a tortious act committed within the state, the court, in upholding the rule, made the following statement, at 375:

> In the closely analogous case of Beetler v. Zotos, 388 F.2d 243 (7th Cir. 1967), the court was faced with this same issue, that is, whether an action for indemnification against a nonresident indemnitor comes within § 17(1) (b) of the Illinois "long-arm" statute which predicates in personam jurisdiction, as does

T.C.A. § 20-235(b), upon "[t]he commission of a tortious act within this State." In concluding that out-of-state service of process pursuant to § 17(1) (b) was valid, the Court of Appeals reasoned that:

> "an indemnitee, where he seeks to recover for damages paid for injuries caused by the negligent or wrongful act of the indemnitor, may proceed by action ex delicto, as by an action on the case—a tort action." (388 F.2d at 245) [Citations omitted.]

RCW 4.28.185, our long-arm statute, does not discriminate between first and third party actions. A third party plaintiff has the same rights as the primary plaintiff and, under the statute and CR 14(a), *supra*, may bring in a nonresident who is or may be liable to him for all or part of the primary plaintiff's claim against him.

The petitioner cites *Tyee Constr. Co. v. Dulien Steel Prods. Co.*, 62 Wn.2d 106, 381 P.2d 245 (1963), as requiring a third party plaintiff asserting jurisdiction over a nonresident to separately establish jurisdiction on the basis of contacts within the forum between that party and the proposed third party defendant. This was not the issue in Tyee. The question there was whether the third party defendant had transacted sufficient business *within this state* to be brought within the meaning of our long-arm statute, RCW 4.28.185(1) (a). We held it had not. Not so as to Kansai. The *Tyee* case further is not apposite in that it in no way involves an indemnification action arising out of the commission of a tortious act committed in this state.

For the reasons heretofore stated, we hold that the petitioner, Kansai, has submitted itself to the jurisdiction of the courts of this state.

The order of the trial court, denying the motion for dismissal of Kansai as the third party defendant in this case, is affirmed.

s/HUNTER, J.

WE CONCUR:

HAMILTON, C. J.
FINLEY, J.
ROSELLINI, J.
HALE, J.
NEILL, J.
STAFFORD, J.
WRIGHT, J.
UTTER, J.